

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

CAROLYN A. LAFOREST and GERALD H.
LAFOREST,

Plaintiffs,

vs.

Case No. 2005-0761-NH

ST. JOHN MACOMB HOSPITAL, assumed
name of ST. JOHN HEALTH SYSTEM –
DETROIT – MACOMB CAMPUS, a Michigan
corporation, THE STANLEY WORKS, a foreign
corporation; BOON EDAM, INC., a foreign
corporation, and DETROIT DOOR AND
HARDWARE CO., a Michigan corporation,
Jointly and Severally,

Defendants.

OPINION AND ORDER

Defendant Detroit Door and Hardware Company (“Detroit Door”) has brought a motion for summary disposition.

Plaintiff¹ filed this complaint on February 25, 2005, and later amended her complaint to bring in defendant Detroit Door. Plaintiff asserts that on March 10, 2004, her foot was caught in a revolving door on the premises of St. John Health System Detroit – Macomb Campus (“St. John”), causing her to fall and suffer, *inter alia*, severe injury to her left elbow. Plaintiff alleges that the revolving door was manufactured by defendant Boon Edam; sold, installed and serviced by defendant The Stanley Works (“Stanley”); and subsequently serviced by defendant Detroit

¹ For the sake of convenience, “plaintiff” shall refer only to plaintiff Carolyn LaForest.



Door. Plaintiff alleges negligence and gross negligence as to each defendant. Plaintiff's husband, Gerald LaForest, alleges loss of consortium.

Defendant Detroit Door now brings a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtko v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). The adverse party may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. MCR 2.116(G)(4). The court must consider all this supporting and opposing material. MCR 2.116(G)(5); and *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

In support of its motion for summary disposition, Detroit Door argues that plaintiff has failed to proffer any evidence whatsoever in support of her claim that Detroit Door negligently maintained the door in question. Detroit Door notes that it was not in control of the premises on which she was injured, and thus did not have any duty to ensure the safety of the premises or

warn invitees. Detroit Door also claims that it only serviced the doors when contacted by St. John, and had not serviced the doors for almost one year prior to the alleged incident. Next, Detroit Door argues that it cannot be held liable for breach of duty as a maintenance provider unless plaintiff demonstrates a duty separate and distinct from those under the contract, which Detroit Door avers plaintiff has not done. Finally, Detroit Door argues that plaintiff has proffered no evidence that it engaged in grossly negligent conduct with respect to the maintenance of the door.

In response, plaintiff claims that there is a genuine issue of material fact as to whether Detroit Door had an ongoing service contract with St. John. Plaintiff claims that defendant Detroit Door did have a common law duty to plaintiff separate and distinct from its contractual obligations, and plaintiff distinguishes the case at bar from the authority cited by Detroit Door in its motion. However, plaintiff concedes that she has not discovered any evidence of gross negligence. Plaintiff also concedes that her complaint is presently deficient, but requests that the Court grant leave to amend the complaint. Lastly, plaintiff requests that, in the event summary disposition is granted in Detroit Door's favor, the Court also enter an order precluding the remaining defendants from making any arguments during trial suggesting that Detroit Door is a non-party at fault.

The Court shall first address Detroit Door's request for summary disposition pursuant to MCR 2.116(C)(8). This motion appears to be primarily based on Detroit Door's argument that it cannot be held liable for breach of duty as a maintenance provider since plaintiff has not demonstrated a duty separate and distinct from those under the contract.

The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff, since it "is axiomatic that there can be no tort liability unless defendants owed a duty to

plaintiff.” *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). “If one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner.” *Fultz v Union-Commerce Associates*, 470 Mich 460, 465; 683 NW2d 587 (2004) (citation omitted). However, “a tort action will not lie when based solely on the nonperformance of a contractual duty.” *Id.* at 466 (citation omitted). Rather, the threshold question is whether a defendant breached a duty *separate* and *distinct* from the duties the defendant assumed under the contract. *Id.* at 467. One such separate and distinct duty is to refrain from creating new hazards. *Id.* at 469. Another separate and distinct duty is the “common-law duty to act in a manner that does not cause unreasonable danger to the person or property of others.” *Ghaffari v Turner Const Co*, 268 Mich App 460, 466; 708 NW2d 448 (2005) (citation omitted).

A plaintiff may also establish that he is owed a duty separate and distinct from defendant’s duties under a contract by showing that he is a third party beneficiary of the contract. See, e.g., MCL 600.1405. A third-party beneficiary may be a member of a sufficiently described class, and this “class must be something less than the entire universe.” *Brunsell v City of Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002). However, “a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation ‘directly’ to or for the person.” *Id.*

As a preliminary matter, the Court disagrees with plaintiff’s contention that she was a third party beneficiary of the alleged maintenance contract simply because she was as an invitee using the hospital’s revolving doors. The duty which Detroit Door allegedly undertook was clearly intended to benefit St. John. Any benefit which the contract might have had for third parties was purely incidental, and nothing presented to this Court even remotely suggests that

Detroit Door undertook its contractual obligations directly for the benefit of individuals in plaintiff's class.

Plaintiff's complaint outlines several "duties" which defendant Detroit Door allegedly breached. Specifically, plaintiff alleges that Detroit Door failed to ensure the revolving door was safe, failed to maintain the door in a safe manner, failed to place reasonable warnings on the door, failed to ensure the door's safety system would detect people, failed to repair the door, failed to ensure the door did not operate with excessive speed and force, and other unspecified acts of negligence. However, plaintiff does not allege that Detroit Door was in control of the premises at the time of her injury. Moreover, none of plaintiff's allegations *explicitly* state that Detroit Door owed a duty to plaintiff separate and distinct from its contractual obligations, that Detroit Door's maintenance of the door created a new hazard, or that plaintiff was a third party beneficiary of the maintenance contract.

Nevertheless, the allegations at least *imply* that Detroit Door's maintenance of the door might have either (1) contributed to the creation of a new hazard (i.e., defective sensors) which caused plaintiff's injury or (2) caused an unreasonable danger to others. While these implicit "allegations" do not rectify the deficiencies in plaintiff's complaint, plaintiff concedes that her complaint is currently inadequate and has requested leave to amend it. In the case at bar, the Court is satisfied that the interests of justice support allowing plaintiff to amend her complaint. See MCR 2.118(A)(2). As such, the Court believes that summary disposition of plaintiff's negligence claim as to defendant Detroit Door should not be granted pursuant to MCR 2.116(C)(8).

Next, the Court turns to Detroit Door's request for summary disposition under MCR 2.116(C)(10). Detroit Door provides the affidavit of its vice-president indicating that Detroit

Door did not have a continuing maintenance agreement with St. John, and that the last date on which Detroit Door had serviced the doors was March 13, 2003.² Detroit Door's Exhibit H, Affidavit of Alan Hull; and see Detroit Door's Exhibit I, Service Reports. *Id.*

Plaintiff, however, has provided a copy of St. John's interrogatory answers, indicating that it had contracted with Detroit Door for service of the automatic door in question. Plaintiff's Exhibit A, Defendant St. John's Answers to Interrogatories, answers to interrogatories 11 and 34. Plaintiff has also offered a purchase request from St. John indicating that Detroit Door was responsible for "servic[ing the] automatic doors as needed" during the period from February 1, 2003 to January 31, 2004. Plaintiff's Exhibit B, St. John Health System Purchase Request.³

During the hearing on this motion, Detroit Door's attorney correctly pointed out that the purchase request does not necessarily indicate that a service contract actually existed during the time specified. Rather, the purchase request appears to be an essentially internal memorandum. Detroit Door's attorney also questioned the evidentiary value of St. John's interrogatory answers. However, while the documentary evidence certainly does not establish that Detroit Door had entered into a continuing maintenance agreement concerning the doors, the documentary evidence at least indicates that there are genuine issues of material fact concerning the alleged agreement. Therefore, the Court is satisfied that summary disposition pursuant to MCR 2.116(C)(10) is inappropriate on this basis.

Plaintiff has also presented documentary evidence supporting its position that Detroit Door's actions with respect to the door constituted negligence. Specifically, plaintiff presented the affidavit of an expert witness opining that the sensors used on automatic revolving doors

² The report for March 13, 2003, indicates that Detroit Door's employee removed "covers" on the door and adjusted its speed setting.

weaken over time and begin to detect objects in a more limited field of vision. Plaintiff's Exhibit C, Affidavit of Warren Davis, Ph.D. at 3. Dr. Davis opines that the inspections needed to safely maintain the sensors are complex, and that the daily inspections undertaken by St. John's staff were totally inadequate. *Id.* at 3-4. Dr. Davis also opines that defendants Stanley and Detroit Door would have been in the best position to maintain the doors and advise St. John of the dangers associated with them. *Id.* at 5. As such, the Court is satisfied that summary disposition under MCR 2.116(C)(10) is inappropriate on this basis as well.

On the other hand, plaintiff concedes in her response to Detroit Door's motion for summary disposition that she has discovered no evidence supporting her claim that Detroit Door was grossly negligent. Therefore, summary disposition of her claim for gross negligence as to Detroit Door is appropriate.

Finally, since summary disposition of plaintiff's substantive claim for negligence as to Detroit Door is properly denied, Detroit Door's request for summary disposition of Gerald LaForest's derivative claim for loss of consortium is also properly denied.

For the reasons set forth above, defendant Detroit Door and Hardware Company's request for summary disposition of plaintiff's negligence claims is DENIED, and Detroit Door's request for summary of disposition of plaintiff's husband's derivative claim for loss of consortium is also DENIED. Plaintiff's request to amend her complaint is GRANTED, and plaintiff is ORDERED to file an amended complaint within 14 days of this Opinion and Order. Defendant Detroit Door's motion for summary disposition of plaintiff's gross negligence claims

³ The affidavit attached as an exhibit to plaintiff's response is unsigned, but no objection was made to the affidavit during the hearing conducted on July 10, 2006. Further, plaintiff subsequently provided the original signed affidavit to the Court.

is GRANTED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

JMB/kmv

DATED: July 19, 2006

cc: Ronald F. DeNardis, Attorney at Law
Alexander B. Jarowyj, Attorney at Law

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Kevin P. Moloughney, Attorney at Law

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JAMES M. BIERNAT, Circuit Judge